1948

Oscar Perris v. Margaret Perris : Reply Brief of Defendant and Appellant

Utah Supreme Court

Jensen & Jensen; Attorneys for Defendant and Appellant; Eldon A. Eliason; Attorney for Respondent.

7207

IN THE SUPREME COURT OF THE STATE OF UTAH

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OSCAR PERRIS,)
Plaintiff, (
vs.) No. 7207
MARGARET PERRIS, (
Defendant.)

- - - -

REPLY BRIEF OF DEFENDANT AND APPELLANT

- - - -

APPEALED FROM THE DISTRICT COURT OF UTAH
IN AND FOR MILLARD COUNTY

Will L. Hoyt, Judge.

JENSEN & JENSEN, Attorneys
For Defendant and Appellant.

ELDON A. ELIASON, Attorney
For Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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OSCAR PERRIS,)

Plaintiff (

vs.) REPLY BRIEF

MARGARET PERRIS, (No. 7207

Defendant.)

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Much of the first seven pages of Eliason's brief is devoted to what he assumed to be an inference upon the part of counsel for appellant that we had not been heard. The assumption is erroneous. Our statements to the effect that the appeal was from two orders entered in the absence of counsel for the defendant are correct. They were made to come within the provision of section 104-39-2 U.C.A. '43 that such orders are deemed excepted to.

In Eliason's brief he states the court "requested that before such orders were made that counsel for appellant herein

be given notice" (br. 4). On page "2" thereof he admits the $300.00 was deposited with the clerk of said court by order of the court. Eliason came to court and made his oral request for the fund, thereby recognizing the money was in the custody of the court. He does not challenge the law that the money in the custody of the law may not be interferred with by execution, garnishment or similar process. He argues, however, that we should have levied upon said fund, apparently for the reason that the money herein was not originally deposited on the basis that this was a litigation to determine who was the owner of the fund. It appears to us the law in this respect is not so restricted. We refer to our previous citation, Gibbons v. Ellis 165 Pac. 783 (Colo.), and 23 C. J. sec. 108, p, 357-8.

Further he states in his brief: "and

it is submitted that thereafter (after judgment herein) that plaintiff assigned the deposit to Eldon A. Eliason (R40), which he had a right to do, since at the time the defendant, appellant herein, could have no possible claim against said deposit,**" (br. 15). We challenge that statement.

We concede that until the court disposed of the deposit it was held as the property of the plaintiff, but subject to the terms of its deposit as provided by statute and of the right of his divorced wife to receive the same for their children's support and maintenance as ordered by the trial court. Had he supported his children as the court ordered there would have been no question here. Failing in that we contend he might not transfer and assign his property in Utah to anyone with notice, where the effect thereof is to deprive said children of support

from plaintiff.

> "A judgment or decree awarding alimony to the wife is sufficient to establish her rights as a creditor of the husband to impeach a conveyance made by him with intent to defraud her of the alimony".
> 19 C.J. 318 sec. 734---Divorce.

A fortiori the rule is the same for his children.

> "It is generally held that a wife, in respect of her right to maintenance or alimony, is within the protection of statutes or the rule avoiding conveyances or transfers in fraud of creditors or other persons to whom the maker is under legal liability. It seems that this is so irrespective of whether the conveyance or transfer was made before and in anticipation of a suit by the wife for divorce or for maintenance or alimony, pending the suit, after a decree had been made in the wife's favor, or even before and in contemplation of marriage."
> 26 Am. Jur. 815, sec. 197, Husband and Wife.
> Same 18 L.R.A. ns 1147-57.
> Same: Wilson v. Wilson, 32 U. 169, 89 Pac. 443.

We affirm our position that the said assignment was not before the trial court, is not before this court, and may not be

considered. But if we are in error in this view, and the court considers said assignment, we accordingly submit the purported assignment was prima facie a fraud upon plaintiff's wife and children; and an equity court should have declined and refused to have recognized the same; but on the contrary should have ordered the clerk to turn the same to the defendant to apply upon her judgment against plaintiff for the support of their minor children in the case.

Respectfully submitted,

JENSEN & JENSEN

Attorneys for Appellant.